In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 167

HARRY R. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 356 F. 2d 868.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1966 (Pet. App. 10a). The petition for a writ of certiorari was filed on May 24, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the conviction in this case constituted a valid application of 18 U.S.C. 2113(a).

2. Whether petitioner was properly sentenced under 18 U.S.C. 2113(a) rather than under sub-paragraph (b) of the same section.

STATUTE INVOLVED

18 U.S.C. 2113 provides:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or
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> Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—
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> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.
>
> (b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or
>
> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100

belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

* * * * *

STATEMENT

After a trial by jury in the Southern District of Iowa, petitioner was convicted under an indictment charging that he entered a federally insured bank with intent to commit a larceny in violation of 18 U.S.C. 2113(a). Petitioner was sentenced to twenty years' imprisonment and the conviction was affirmed on appeal. *Smith* v. *United States,* 331 F. 2d 265, certiorari denied, 379 U.S. 824. After petitioner began serving his sentence he filed a motion under Rule 35, F.R. Crim. P., to reduce the sentence. This motion was denied and no appeal was taken. Thereafter, petitioner filed a motion under 28 U.S.C. 2255 to vacate the sentence. The denial of this motion was affirmed by the court of appeals (Pet. App. 1a–9a; 356 F. 2d 868).

The evidence at trial, the sufficiency of which has never been questioned, showed that petitioner, his brother and another, named Dalia, broke into a federally insured bank and burglarized its night-deposit safe. They were apprehended the same night after a desperate flight which ended in the death of petitioner's brother (331 F. 2d at 268).

ARGUMENT

1. Petitioner urges that the bank robbery act (18 U.S.C. 2113(a)), which broadly prohibits larceny from federally insured banks, may validly be applied only

to thefts of the "insured funds" of state banks (Pet. 27) and not to other bank property. The Federal Deposit Insurance Act (12 U.S.C. Ch. 16), however, generally insures the ability of a bank to meet the demands of its depositors.[1] Congress is thus legitimately concerned with the soundness of the insured banks and this concern justifies the broad prohibition placed by Section 2113(a) upon thefts of the property of such banks. Cf. *Westfall* v. *United States*, 274 U.S. 256. The facts of this case, moreover, do not in any sense pose the questions of the ultimate limits of federal power which the petitioner suggests would be raised by prosecution for the theft of property seemingly unrelated to the bank's financial position. Petitioner and his confederates stole, not pens or check writing machines (see Pet. 29), but the actual deposits of the bank's customers, an act clearly within the area of permissible federal protection of the bank's ability to meet depositor's demands.

2. There is no substance to petitioner's argument (Pet. 30–34) that punishment had to be imposed in this case under 18 U.S.C. 2113(b)—providing for a maximum prison sentence of ten years—rather than under 18 U.S.C. 2113(a)—providing a maximum sentence of twenty years—merely because the theft was consummated. Subsection (a), under which peti-

[1] The Act provides: "Whenever an insured bank shall have been closed on account of inability to meet the demands of its depositors, payment of the insured deposits in such bank shall be made by the Corporation as soon as possible * * *" 12 U.S.C. 1821(f). The Federal Deposit Insurance Corporation may terminate the insurance of a bank whose practices it regards as "unsafe or unsound" 12 U.S.C. 1818(a).

tioner was prosecuted, applies to thefts or attempted thefts involving either personal violence or intimidation or illegal entry. Subsection (b), on the other hand, provides a lower penalty for completed thefts—such as embezzlements—which may not contain this element of violence or unlawful entry. Since petitioner's crime—a nighttime burglary—clearly contained the extra element of unlawful entry necessary for prosecution under Subsection (a), he was properly charged and sentenced under that subsection even though he may also have violated the terms of Subsection (b) by consummating a theft. See *United States* v. *Williamson,* 255 F. 2d 512 (C.A. 5), certiorari denied, 358 U.S. 941; *Purdom* v. *United States,* 249 F. 2d 822 (C.A. 10), certiorari denied, 355 U.S. 913. The rule in *Prince* v. *United States,* 352 U.S. 322, relied upon by petitioner, requires only that the court may not cumulate the penalties under the two subsections; it does not require prosecution for the lesser crime where the greater was committed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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